73-1578

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-

FILIPPO IVELI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari be granted to review the order and determination of the United States Court of Appeals for the Second Circuit rendered the 22nd day of Februry, 1974, affirming without opinion the judgment of the United States District Court for the Southern District of New York, rendered the 9th day of November, 1973, convicting petitioner of violating the narcotics laws of the United States, after trial before Honorable Morris Lasker and a jury.

OPINION BELOW

No opinion was rendered by the United States Court of Appeals.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The United States Court of Appeals affirmed the judgment of conviction on the 22nd day of February, 1974, and, on the 18th day of March, 1974, Associate Justice Thurgood Marshall extended petitioner's time to file a Writ of Certiorari until April 23, 1974. Copies of the order of the United States Court of Appeals and of Justice Thurgood Marshall's extension of time are annexed hereto as exhibits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Fifth and Sixth Amendments of the United States Constitution are involved herein, as well as 18 U.S.C. Sections 2510-2518.

QUESTIONS PRESENTED

1. Whether the law permitting wiretapping is constitutional?

2. Whether petitioner's rights to a fair trial were violated by the refusal of the Trial Judge to conduct a minimization hearing as to the wiretapping with respect to "underlying warrants and tapes and taps"?

3. Whether in fact proper minimization of the wiretaps was effectuated in view of the fact that all but 2 of 115 intercepted calls were overheard and recorded despite the fact that later it was determined that many of these calls were not pertinent?

4. Whether it was error to deny petitioner a severance of trial from the co-defendant, Salvatore Larca (who was acquitted), since Larca invoked the Fifth Amendment when petitioner sought to call him as a witness?

5. Whether petitioner's rights to a fair trial were violated by the elicitation from the government witness Fonte that Iveli had communicated a threat to him, in view of the circumstance that no notification of this threat had ever been made prior to the testimony itself, nor had any report appeared among the 3500 material?

THE FACTUAL BACKGROUND

The factual issues herein are not difficult to comprehend and it is apparent from a perusal of the record that the conviction is predicated upon the testimony of accomplices, namely Frank Fonte, James Johnson, Jr. and Robert Mentrasti. These three accomplices were all admittedly involved in drug dealing and were convicted upon their own pleas of guilty prior to trial.

It is undisputed that substantial electronic surveillance was conducted by various state law enforcement authorities, the products of which were turned over on a "silver platter" to the federal government. Appropriate motions to suppress were made as well as a request for a minimization hearing. The Court denied a meaningful minimization hearing on the apparent grounds that the petition lacked standing, although it is obvious that the federal government must have obtained the leads relating to Iveli, as well as information, from these wiretaps. As a matter of fact, Iveli was the direct subject of several of the wiretap orders which were obtained.

Since this appeal if proceeding *in forma pauperis*, we would ask this Court to review the original exhibits of those wiretap orders indicating that Iveli was the subject of telephonic interceptions by wiretap.

Additionally, the petitioner was tried along with several other co-defendants. Motions for severance were made but denied, despite the fact that Iveli indicated that he necessarily would be prejudiced unless he could call Salvatore Larca, a co-defendant who was acquitted at the trial, as a witness in his behalf.

The use of the testimony of accomplices is fraught with dangers not ordinarily involved in cases where disinterested witnesses are used by the prosecution. In this context, the testimony of Frank Fonte, one of the main witnesses of the prosecution, was most damaging and most prejudicial. The reason for this is that Fonte, during the trial, was suddenly asked to testify about an alleged threat against him that was made by Iveli, although no prior notification of this was given to the defense and there was no reference to it in the 3500 material which was supplied.

This certainly constituted a post-conspiratorial statement, since the petitioner could not have been in conspiracy with Fonte at the time because Fonte was already then cooperating with the Government.

Moreover, it seems amazing that there would have been no notification through 3500 material that a threat had been communicated and that nothing in the bail hearings was said about threats.

The virulence of this testimony is seen in the fact that the alleged main culprit, Salvatore Larca, was acquitted because no narcotics were ever found in his possession. Similarly, in the case of Iveli, despite elaborate surveillance, both visual and by wiretap, he was never found in possession of narcotics. Thus, the alleged threat which Iveli supposedly communicated to Fonte was most damaging because it tended to corroborate Fonte's allegations that Iveli was involved by means of self-serving and uncorroborated accusations about threats.

Iveli had never been in trouble with the law with the exception of a gambling arrest. He had no background whatsoever in drugs.

The circumstances of this case, therefore, will revolved around legal issues and sufficiency of evidence rather than matters affecting the credibility of witnesses as such.

Iveli sought to obtain the testimony of a co-defendant Salvatore Larca, but the latter refused to testify unless a severance was granted since he also had sought to obtain the testimony of Iveli (997-1005; 1097-1106).*

*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated.

REASONS FOR GRANTING THE WRIT

I.

This Court has never directly passed upon the constitutionality of the federal wiretap statutes, 18 U.S.C. Sections 2510-2518. Petitioner submits that wiretapping violates the Fourth Amendment and should be declared unconstitutional. In any event, however, in the case at bar there was no proper showing of minimization of the electronic surveillance.

The petitioner was admittedly the subject of electronic surveillance conducted by New York Couty and other counties, and the Government produced a number of wiretap orders and affidavits supporting such orders, which resulted in extensive electronic surveillance, not only of Iveli, but of people allegedly involved in the conspiracy.

At 760 of the record, Judge Lasker declared that he would have to deny a minimization hearing "as to underlying warrants and tapes and taps . . . I have concluded that they do not have the right, they do not have the standing . . . ."

While on September 10, 1973, there was a brief hearing which included the question of minimization to a limited extent, there was no hearing with respect to the underlying orders, tapes and taps.

Michael Schnurr, who testified that he was attached to the New York City Police Department, stated that he conducted surveillances in connection with an investigation of this case. In this regard, Schnurr admitted

that all calls were intercepted and were listened to for at least a period of sixty seconds and that other calls were listened to in their entirety. Schnurr stated, however, that none of the calls received were determined to be non-pertinent, so all the calls, with the exception of two, were recorded.

In other words, of the 115 calls that were intercepted, only *two* were not recorded (83-86, Minutes of 9/10/73).

In retrospect, however, Schnurr conceded that some of the calls which were allegedly thought to be pertinent, were not deemed pertinent (85).

Finally, Schnurr conceded, in questioning by the Court, that actually he listened to every call that he had intercepted for as long as it lasted (85).

We submit, however, that the Court below, in *United States v. Bynum*, 475 F.2d 832 (2 Cir. 1973) and *United States v. Manfredi*, ____ F.2d____; Docket No. 72-2278, decided November 23, 1973, clearly indicated that where there is any possible evidence that electronic surveillance aggrieved a party directly or indirectly, that he is entitled to a minimization hearing. The rather cursory hearing permitted on September 19, 1973, was certainly insufficient.

We also call this Court's attention to the fact that in both *Manfredi* and *Bynum*, *supra*, implicit in the opinion of the Tribunal below, was the recognition that unless there was proper minimization, the use of electronic surveillance was fatal. This Court's dicta in *Gelbard v. United States* is consistent.

The obtaining of convictions have sometimes been exemplified by reprehensible and illegal methods. The Supreme Court has called this a pollution of the law and that the dignity of the United States Government will not permit convictions based upon such evidence (*Mesarosh v. United States*, 352 U.S. 1, 9, 14; *Wong Sun v. United States*, 371 U.S. 471; *Silverthorne Lumber Co. v. United States*, 251 U.S. 385).

In *Coolidge v. New Hampshire*, 403 U.S. 443, quoting with approval the language of *Boyd v. United States*, 116 U.S. 616 at 635, the Supreme Court warned against deviations that caused an erosion of constitutional and statutory rights. There the Supreme Court explained:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; *but illegitimate and unconstitutional practices, get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure.* This can only be obviated by adhering to the rule that constitutional provisions . . .should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it *consisted more in sound than in substance.* It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon." (Emphasis ours.)

In I Cooley, *Constitution Limitations*, (8th Ed.), Section 646, this famous author declares:

> "In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them immense power for oppression; and it is to be feared that they do not always sufficiently appreciate the responsiblity, and wield the power with due regard to the legal rights and privileges of the accused. . . ."

In *Miranda v. Arizona*, 384 U.S. 436 and *Mapp v. Ohio*, 367 U.S. 643, the Supreme Court also indicated that the law must be obeyed and irrespective of whether or not the prisoner goes free, it is the law that must be obeyed and not the determination of the nature of the crime that must be inquired into.

In *Mapp v. Ohio*, for example, the Supreme Court declared (367 U.S. at 659):

> "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence."

In *Lee v. Florida*, 392 U.S. 378, the Supreme Court of the United States noted that it had failed to find a single case where law enforcement officers had ever been prosecuted for blatantly violating the provisions forbidding improper wiretapping. The determination of the United States Supreme Court therefore was that the wiretaps must be kept out of evidence as a deterrent and that no prohibition and no sanction against the officers who

violated the spirit and letter of the law could be tolerated. Thus, the Court explained in *Lee v. Florida*:

> "But the decision we reached today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the 'imperative of judicial integrity.'
>
> *Elkins v. United States* . . .Under our constitution *no court, state or federal, may serve as an accomplice* in the willful transgression of 'the laws of the United States,' laws by which 'the judges in every state are bound . . . .'
>
> Finally, our decision today is counseled by experience. The hope was expressed in *Schwartz v. Texas* that 'enforcement of the statutory prohibition in Sec. 605 can be achieved under the penal provisions' of the Communications Act, 344 U.S. at 201 . . . . That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of Sec. 605 since the statute was enacted. We conclude, as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way — by removing the incentive to disregard it.' *Elkins v. United States*, . . . reversed." (Emphasis ours.)

It is also to be noted that both the state and federal statutes require minimization. Certainly, as applied in a federal court, the minimization requirement is a prerequisite (18 U.S.C. Sections 2510-2518).

In *Berger v. New York*, 388 U.S. 41 (1967), the Supreme Court noted that the New York statute authorizing wiretapping was *prima facie* unconstitutional and, therefore, unless saved by compliance with new federal standards, the wiretaps here would necessarily be invalid. Without a hearing, however, it is impossible to determine whether or not proper minimization was in fact practiced. The mere articulation in the order that it should be practiced, does not mean that it in fact actually was.

In *Gelbard v. United States*, 408 U.S. 41, 46, 50 (1972) and *Katz v. United States*, 389 U.S. 347, the Supreme Court made it quite clear that strict standards would be applied to determine whether or not there was proper minimization or, for that matter, proper compliance with statutory prerequisites. (See, *United States v. Kahn*, ____U.S.___, 39 L.ed. 2d 225 at 234.)

When invading one's privacy, there is a *prima facie* assumption that the Fourth Amendment has been violated unless the Government can establish that they acted under a warrant that was not only obtained in accordance with law, but which was then executed in accordance with law, (*Coolidge v. New Hampshire*, 403 U.S. 443, and *Elkins v. United States*, 364 U.S. 206).

II.

The petitioner was prejudiced by the failure of the Trial Court to grant a severance so that he could use co-defendant Larca as a witness and also by virtue of the fact that the prosecution was permitted to adduce testimony from the witness Fonte about alleged threats when there was no prior notification given that a statement of the defendant was to be used in evidence despite a request therefore.

The petitioner herein was never found in possession of narcotics despite the elaborate and lengthy surveillances by electronic means and visual observations. He had no background in narcotics and, of course, it is the position of the prosecution that their cooperating witnesses were telling the truth.

On the other hand, the defense necessarily maintains that petitioner was innocent and that at no time was he involved in narcotics in any way since he was first, last and always, a gambler.

During the trial, Larca, one of the co-defendants who was acquitted, had sought to obtain the testimony of Iveli and Iveli sought to obtain the testimony of Larca, since it seemed obvious that they could be extremely helpful to each other. On the other hand, because of the fact that they were co-defendants being tried simultaneously, there was no way of compelling either to testify on the other's behalf. As a matter of fact, Iveli was actually called outside the presence of the jury, but stated that he refused to testify on the grounds of possible self-incrimination (1097-1106)

The Court should have granted the severance to one of the two at least, but this was not done. We maintain that Iveli was there by prejudice.

This was a case where accomplices were the prime witnesses against the petitioner. As such, their testimony had to be scrutinized very carefully. The testimony of accomplices, of course, is inherently suspect because they are naturally trying to salvage their own freedom. In each of the case, the accomplices had everything to gain and nothing to lose by virtue of testimony that was helpful to the Government.

In this context, some sort of corroboration was extremely important so far as the Government was concerned.

In the case of Larca, who was acquitted, the Government really had no corroboration other than the accomplice's testimony, and he was acquitted.

In the case of Iveli, however, there was corroboration of a self-serving nature introduced when the witness Frank Fonte suddenly announced that a threat had been communicated to him by Iveli. This was, of course, very dangerous and prejudicial testimony because it now not only tended to corroborate Fonte, but painted Iveli as someone to be feared, despite the fact that he had not yet taken the stand. Because of that testimony, the Court was told that petitioner would have to reevaluate whether or not he would take the stand.

The most troublesome aspect of this incident was that none of the 3500 material contained any reference to a threat, and apparently nothing was ever said about it at the bail hearings involving Iveli.

Fonte was extremely anxious to help the Government because his own future depended upon his value as a witness.

In *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966), the Court aptly condemned such tactics, referring to the case of *Krulewitch v. United States*, 336 U.S. 440 at 453. While the Court there was referring to police officers, the same may be addressed to the single prosecution witness of any substance in the case at bar. Thus, in the *Gregory* opinion the Court of Appeals observed:

> "...The volunteering of inadmissible testimony prejudicial to the defendant has been condemned time and again by both state and federal courts. For example, in *Wright v. State*, Okl. Cr. App. 325 P.2d 1089, 1093 (1958), where a law enforcement officer injected this type of prejudicial testimony, not twice as here, but only once, the court stated: 'This type of testimony has often been referred to as an 'evidential harpoon' that has been wilfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider the same. This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all out effort to obtain a conviction.... Officers must be aware that an overzealous attitude is, in most instances,

> detrimental to the prosecution and often results in a retrial of the case at considerable expense to the state.' "

The petitioner had previously requested any statements that would be used against him to be divulged in advance of trial. This was not done because the Government maintained that they did not know about it until almost the last minute (584; 602-605; 241).

The Government, however, had an obligation under *Brady v. Maryland*, 373 U.S. 83, to notify Iveli immediately when it learned that testimony about a threat would be offered. It seems inconceivable that with all the interviews with this witness and his being held in protective custody, that nothing whatsoever would have come to the attention of the Government concerning a threat, until the midst of trial.

The Trial Court erred in permitting its use.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

EXHIBITS

ORDER OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of February one thousand nine hundred and seventy-four.

Present:

HON. J. EDWARD LUMBARD

HON. HENRY J. FRIENDLY

HON. WILLIAM H. TIMBERS

Circuit Judges,

United States of America,

Plaintiff-Appellee

v. 73-2750

Filippo Ivelli, Salvatore Larca, Robert Mentrasti, a/k/a

Order of United States Court of Appeals

Robby, James Johnson, a/k/a Junior, John Boone, a/k/a J.B., Kenneth Saunders, a/k/a Leggs, Ernest Walters,

Defendants,

Filippo Ivelli,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

VINCENT A. CARLIN,
Chief Deputy Clerk

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF THE UNITED STATES

No. A-880

Filippo Iveli,

Petitioner,

v.

UNITED STATES

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 23, 1974.

s/ Thurgood Marshall

Associate Justice of the Supreme Court of the United States

Dated this 18th
day of March, 1974.